

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

74-1887

Civil Appeal Case File No.

Written Argument
By Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

G. HINTON, Leaseholder,
Plaintiff-Appellant,
-against-

CONRAD SCHUBKEGEL, Individually,
and Executor of Estate of
Katarina Scherer,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
73 Civ 4489 (CMM)

BRIEF OF PLAINTIFF-APPELLANT

GRANVILLE HINTON
Plaintiff-Appellant
Pro Se & Representative
c/o Jerome Meckler, Esquire
30 East 42nd Street
New York, New York, 10017
(212) MU. 2-3732

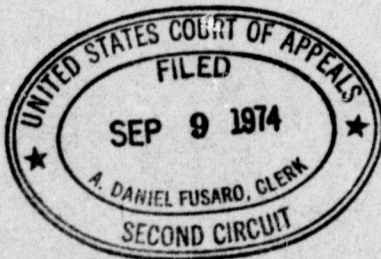


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ISSUES PRESENTED FOR REVIEW

1. Are the invoked procedural and substantive grounds of plaintiff sufficient to warrant opening the dismissal judgment below and remanding case for further proceedings in equal protection resolve?
2. Is the timeliness of the two federal causes in action on the unconstitutional taking for public use, impairment of contract performance obligations, and subject lease res judicata by N.Y. Supreme Court Justice Amsterdam's decision of December 5th, 1974?
3. Is diversity jurisdiction res judicata by the decision of Judge Metzner below of April-24-1974?
4. Why defendant Schubkegel should not be required to state demanded answer response and particularization as required by F.R.Civ.P. Rules 12-e; 7-a; 56-e) and (f)?
5. WHERE is statutory law authority for imposing month to month tenancy against leasee's will and consent?
6. Shall this Appellate Court open and remand this case for further proceedings in equal protection resolve or refer to State Court?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Appeal Docket No. 74-1887

G. HINTON, Leaseholder,
Plaintiff-Appellant,

-against-

CONRAD SCHUBKEGEL, Individually,
and Executor of Estate of
Katarina Scherer,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
73-Civ (CMM)

BRIEF OF PLAINTIFF-Appellant

STATEMENT OF THE CASE

Appellant, plaintiff, Rev. Granville Hinton, leasee leaseholder herein, is real party in interest (USC 28:1654; F.R.Civ.P. 17), citizen resident of the United States and New York County, signatory legal owner of the subject leasehold contract for residence and office use right of a store & Apt. at 1292 Park Ave., N.Y.C., dated Feb-15-1961, yearly term tenancy at \$840.00 yearly rental made to him by late owner lessor Mrs. Katarina Scherer (died about Dec-20-1965) leaving lease with her executor Conrad Schubkegel, defendant-appellee herein, who with his rent agent Ginsburg Bros. Realty took \$2590.00 rents from leasee Hinton from December 1965 up to Feb-15-1969. (lease and paid receipts Exh. "4", Record P. 26.

On January 3, 1969 the leasehold property was sold direct to successor vendee stranger Mount Sinai Hospital for public use by Conrad Schubkegel Scherer Estate executor's agent Susan DeRosa descent cast of Scherer estate without first transferring the deed owner record title to the estate, and without any kind of prior appraisal notice to leasee. Sale was executed from California State, recorded in New York County land register on Feb-6-1969. Leasee never learned of sale until January 1970 when Real Estate Directory was issued. (Scherer and vendee deeds Exh. "8", record pages 21, 26). The leasehold building was condemned and demolished in 1970. (Demolition Certificate Exh. "6", record pages 21, 26).

The right of action grows out of Conrad Schubkegel's unconstitutional taking constructive eviction sale of leasee's private leasehold property for a public use without due process of law and just compensation considerations, and the impairment of the lease due performance obligations. (The complaint Exh. "1", record pages 21, 26).

This appeal seeks review, correction and vacatur of District Court Judge Metzner's Decision order and judgment part dismissing the complaint action and endorsed order denying vacatur and complaint amendment entered May 3, and June 6, 1974 respectfully, pursuant to U.S.C. Title 28, Secs. 2072; 2106; F.R.Civ.P. Rules 54-b; 60-b; 15-b; 52-b; 56-e-f) On the Grounds that furtherance of justice requires due process of law equal protection plenary trial of the two remaining Federal causes never yet considered nor resolved.

Jurisdiction was exercised, applied unequally in favor benefit for defendant Schubkegel's dismissal in unjust abridgement of the Six years Statute of Limitations with the three years statute of limitations, which arbitrarily denied, deprived plaintiff of equal protection procedural remedy and substantive rights to pretrial proceedings and plenary trial.

Newly discovered evidence just surfaced clearly show beyond reasonable doubt that the dismissal motion and affidavit claim of lack of diversity, subject matter, claim under federal law, incapacity, res judicata, time bar, bar of N.Y. GENERAL OBLIGATION LAW, collateral estoppel, all same

are basically without merit, untrue, misleading distortions of the complaint true material facts, federal law invoked on the unconstitutional taking and impairment and time limitation periods, namely: New York Supreme Court Justice Amsterdam's order of Feb-21-1974 directing res judicata on prior order of Dec-5-1973 ordering timeliness and trial of leasee's action for security deposit on the leasehold contract yet pending in #6315-1972, Hinton v. Schubkegel. (Exh. "11", rec-p. 26, app. pp-15a-16a. Affidavit of appellee executor's Attorney Francis Coughlin dated Feb-8-1974, #6315-1972 response to demanded particulars denied knowledge of accounting and whereabouts of the lease security deposit, claims new owner responsibility on which J. Amsterdam ordered trial of the issue. (Exh. "10", rec-p. 26, app. p. 17a.

Affidavit of Kenneth Dubroff Attorney for new owner dated Oct-26-1970, N.Y.S. #16965-1970, rejected the lease and security deposit responsibility. (Exh. "7", rec-p-26, app. p. 21a. Affidavit of Nicholas J. Healy, Attorney for DeRosa.s dated April-10-1970, USDC-70-Civ-1082, admitted non-existence to their knowledge of subject lease. (Exh. "9", rec-p. 26, app. p. 23a).

Affidavit of Jack A. Greenbaum Attorney for DeRosa.s dated May-16-1972, N.Y.S. #6315-1972, admitted the leasehold property was soley managed and rents taken therefrom by the Scherer estate executor Schubkegel, and claim for security deposit is obligation against original lessor not DeRosa.s.

Affidavit of Jack A. Greenbaum, dated Oct-11-1972, N.Y.S. #6315-1972, admitted that Ginsburg Bros. was retained by the Scherer estate executor Schubkegel to manage and take rents from the leasehold property. (Exh. "9", rec-p. 26, app. p. 33a).

In addition the supplemental record herein with pages 26 thru 27 became necessary only because these new, surfaced evidentiary proofs submitted on motion (rec-p-17) for vacatur had been prejudicially removed from the Exhibit volume which now seems were never used, nor recited, nor considered by Judge Metzner's dismissal decision.

The Six years statute of limitations clearly has not expired in bar to the two remaining federal causes and federal law invoked thereon never considered nor resolved.

Defendant Schubkegel denied and challenged the constitutionality of the two federal causes and timeliness, prejudicially deprived plaintiff of equal protection plenary trial whereof now federal intervention jurisdiction is required exercised under U.S.C. Title 28, Section 2403).

ARGUMENT

POINT I

FAILURE TO STATE LEGAL DEFENSE AND
DEFAULTED DEMANDED PARTICULARS.

The complaint is verified, plaintiff moved for summary judgment on defaulted particulars, but Schubkegel failed to state either a verified answer or substantive

are yet pending trial of main cause yet undecided. And under doctrine of res judicata (that final judgment from which no timely appeal is made constitutes bar) and rent claims under original jurisdiction of state courts and the two federal causes here under original jurisdiction of federal courts, the two said dismissals do not constitute a bar to case here.

POINT IV

WHERE IS THE DUE PROCESS OF LAW AND JUST COMPENSATION CONSIDERATIONS MANDATED BY THE CONSTITUTION 5TH AMENDMENT AND NEW YORK CONDEMNATION LAW, SECTION 4)?

It is submitted that leasee was instantly constructively evicted from his private property use right instantly that the Scherer ownership deed record title was conveyed and vested leasee's right running with the land in vendee Mount Sinai Hospital for a public use recorded in New York County on Feb-6-1969, resulted without leasee's fault in immediate loss and damage without due process and just compensation.

POINT V

WHERE IS STATUTORY LAW AUTHORITY FOR IMPOSING MONTH TO MONTH TENANCY WITHOUT THE WILL AND CONSENT OF LEASEE?

It is submitted that leasee was a yearly term in possession paid up tenant by operation of law and lease 29th covenant from Feb-15-1961 up to Feb-15-1969, and the month to month defense allegation is per se a subtle, baseless,

legal defense to the two federal causes, whereof pre-trial interrogatories and truth disclosure proceedings are warranted to conform the pleadings and record to the truth and evidence, as required by F.R.Civ.P. Rules 12-e; 15; 56-e)-(f); 60 (b). And as ordered by order of N.Y.S. Court Justice Saul Streit, #6315-1972, dated Aug-28-1972, (Exh. "11", rec-p. 26).

POINT II

TIMELINESS OF RIGHT OF ACTION ON LEASE IS RES JUDICATA.

It is respectfully submitted that timeliness of the right of action on subject lease under the Six years Statute of Limitations is res judicata by order of N.Y.S. Justice Amsterdam, #6315-1972, dated Dec-5-1973, directed timeliness and trial of leasee's action for lease security deposit return against Scherer estate executor Conrad Schubkegel here in. Which has never been appealed from. Exh-11, rec-p. 26, app. p. 15a).

POINT III

TWO DISMISSALS N.Y.S. #6315-1972 ARE NOT RES JUDICATA BAR TO ACTION HEREIN.

Two dismissals of rent claims, N.Y.S. #6315-1972 by J. Bloustein on Jan-26-1973, and by J. Amsterdam on May-21-73 are not res judicata bar to the two federal causes action here because consolidated appeals from both interlocutory orders

arbitrary deprivation stemming directly from the 1969 sale in constructive eviction and abandonment of leasee, and impaired, made the possession useless and valueless, clearly in violation of the lease contract, constitutional rights of leasee, Section 551, Real Property Actions and Proceedings Law which prohibit descent east from evicting possessed tenants without due process, and Sec. 711, prohibiting eviction of tenants in possession for thirty days or longer without judicial due process. Whereof leasee now is additionally damaged thereby. Moreover, the month to month allegation joins triable issue.

POINT VI

THE SIX YEARS STATUTE IS THE CONTROLLING
TIME LIMITATION LAW OF THIS CASE..
NEW YORK CPLR-213

POINT VII

SHALL THIS APPELLATE COURT EXERCISE
ITS JUDICIAL AUTHORITY TO OPEN THIS
CASE AND REMAND FOR FURTHER PROCEED-
INGS OR REFER TO N.Y. STATE COURT?

It is respectfully submitted that the dismissal motion and affidavit were merely colorable, but actually unsubstantive, deceptive in fact, falls by its own baseless weight, whereof the dismissal judgment is no longer justifiable to be permitted to stand.

CONCLUSION

JUSTICE REQUIREMENTS WARRANT CORRECTION
AND REVERSAL OF THE DECISION - JUDGMENT
BELOW AND REMAND FOR FURTHER PROCEEDINGS.

Respectfully submitted,

GRANVILLE HINTON
Plaintiff-Appellant, pro se
and representative
c/o Jerome Meckler, Esquire
30 East 42nd Street
New York, New York, 10017
(212) MU. 2-3732

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74 - 1887

-----X
G. HINTON, Leaseholder,
Plaintiff-Appellant,

Civil Appeal Case File No.

-against-

73 Civ 4489 (CMM)

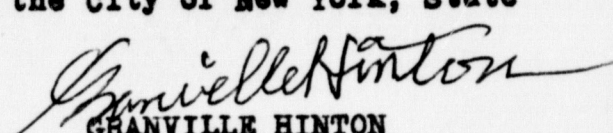
CONRAD SCHUBKEGEL, Individually,
and Executor of Estate of
Katarina Scherer,
Defendant-Appellee.
-----X

AFFIDAVIT OF SERVICE
BY MAIL OF
BRIEF AND APPENDIX OF
PLAINTIFF-APPELLANT

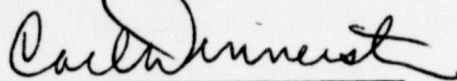
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

The undersigned deponent, being duly sworn, deposes and Says:
That he is the Plaintiff-Appellant pro se and representative herein,
is over the age of twenty-one years and resides in New York City,
New York,

That on the 9th day of September, 1974, deponent served the
within, annexed BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT Upon
FRANCIS J. COUGHLIN, Esquire, Attorney for Conrad Schubkegel,
Individually, and Executor of Estate of Katarina Scherer, defendant-
appellee in this action, At 132 East 85th St.-N.Y.C. N.Y.; 10028,
BY SPECIAL DELIVERY MAIL, the address designated by said attorney
for that purpose, By depositing Two True Copies of same enclosed in
a postpaid properly addressed wrapper, in a Post Office Official
Depository under the exclusive care and custody of the United
States Post Office Department within the City of New York, State
of New York.


GRANVILLE HINTON

Sworn to before me this 9th day of Sept.
1974.



CARL DINNERSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
24-0965550
QUALIFIED IN KINGS COUNTY & N.Y. CO.
COMMISSION EXPIRES MAR. 30, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1887
Civil Appeal Case No.
Index No.

G. HINTON, Leaseholder,
Plaintiff-Appellant,

Plaintiff -
Appellant,

against

CONRAD SCHUBKEGEL, Individually,
and Executor of Estate of
Katarina Scherer,
Defendant-Appellee.

Defendant -
Appellee.

AFFIDAVIT OF SERVICE
BY MAIL OF
BRIEF OF PLAINTIFF-APPELLANT
WITH CLERICAL CORRECTIONS

STATE OF NEW YORK, COUNTY OF NEW YORK)

ss.:

The undersigned being duly sworn, deposes and says:
Deponent is ~~not a party to~~ plaintiff-appellant pro se & representative in/
the action, is over 18 years of age and resides at New York City,
New York,

That on the 12th, day of Sept., 19 74 deponent served the annexed, within
BRIEF OF PLAINTIFF-APPELLANT WITH CLERICAL CORRECTIONS

on FRANCIS J. COUGHLIN, Esquire,
attorney(s) for CONRAD SCHUBKEGEL, Individually, and Executor, defendant-
in this action at Appellee, in this action, Appeal proceeding,
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me this 12th
day of Sept. 1974.

CARL DINNERSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
24-0965550
QUALIFIED IN KINGS COUNTY & N.Y. CO.
COMMISSION EXPIRES MAR. 30, 1975

The name signed must be printed beneath

Granville Hinton

Index No.

Plaintiff

against

Defendant

**ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

That on

19, deponent served the annexed

on

attorney(s) for
in this action at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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G. HINTON, Leaseholder,
Plaintiff-Appellant,

-against-

CONRAD SCHUBKEGEL, Individually,
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74 - 1887
CIVIL APPEAL FILE No.

73 Civ 4489 (CMM)

AFFIDAVIT OF
SERVICE OF
BRIEF AND APPENDIX OF
PLAINTIFF-APPELLANT

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 : ss.:
COUNTY OF NEW YORK)

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That he is the plaintiff-appellant pro se and representative herein,
is over the age of twenty-one years and resides in New York City,
New York.

That on the 9th day of September, 1974, deponent served the
within, annexed BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT Upon ~~Francis J. Doughlin~~
~~Francis J. Doughlin, Esquire, Attorney for Conrad~~
Schubkegel, Individually & Executor of Estate of Katarina Scherer,
defendant-appellee in this action At 132 East 85th St.-N.Y.C. 10028,
By SPECIAL DELIVERY MAIL, the address designated by said attorney
for that purpose, By depositing Two True Copies of same enclosed in
a postpaid properly addressed wrapper, in a Post Office Official
Depository under the exclusive care and custody of the United
States Post Office Department within the City of New York, State
of New York.

Granville Hinton
GRANVILLE HINTON

Sworn to before me this 9th day of Sept., 1974

Carl Dinnerstein
CARL DINNERSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
24-0965550
QUALIFIED IN KINGS COUNTY & N.Y. CO.
COMMISSION EXPIRES MAR. 30, 1975

Francis J. Doughlin
NOTARY PUBLIC, STATE OF NEW YORK
24-09655550
QUALIFIED IN KINGS COUNTY & N.Y. CO.
COMMISSION EXPIRES MAR. 30, 1975
Sept 9 - 1974

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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AND BAILLIE, AND JACK A. GREENBAUM, Esquires, Attorneys for Conrad
Schubkegel, Individually & Executor of Estate of Katarina Scherer,
defendant-appellee in this action At 132 East 85th St.-N.Y.C. 10028,
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Sworn to before me this 9th day of Sept., 1974

15

Carl Dinnerstein
CARL DINNERSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
24-0965550
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COMMISSION EXPIRES MAR. 30, 1975

